Supreme Court, U.S.
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No. 02-265

IN THE

Supreme Court of the United States

SUSANNA SHAW,

Petitioner,

v.

DAVID REPLOGLE AND THE LAW OFFICE OF DAVID REPLOGLE, A PROFESSIONAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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in pro per

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1997 U.S. Dist. LEXIS (N.D. Cal., March 28, 1997) 1

Iannochino v. Rodolakis,
242 F.3d 36 (1st Cir. 2001) 1

Osherow v. Ernst & Young, LLP
(In re Interlogic Trace, Inc.),
200 F.3d 382 (5th Cir. 200) 1

REASONS WHY WRIT SHOULD BE HEARD

I.

INFORMATION PROVIDED IN RULINGS FROM OTHER JURISDICTIONS CONFLICT WITH THIS DECISION BY THE NINTH CIRCUIT

Respondent is not understanding the area where decisions of the First and Fifth Circuit courts are in conflict with the controlling decision of the Ninth Circuit court on the same important matter, involving decisions in bankruptcy which are not subject to res judicata.

Petitioner is not disputing the fact that both the Fifth Circuit in *Interlogic-Trace v. Ernst & Young, 200 F.3d* (5th Cir. 2000) and the First Circuit in *Iannochino v. Rodolakis*, 242 F.3d 36 (1st cir. 2001) came to the same conclusion as the Ninth Circuit in *Epstein v. Visher,* 1997 U.S. Dist. Lexis (N.D. Cal., March 28, 1997), that the debtors should have raised their legal malpractice claims at the attorney's fee application hearings and were therefore barred by res judicata from pursuing the claim later.

However the First and Fifth Circuit rulings did address the issue of what would have happened if the debtors had raised the malpractice counterclaim at the fee application hearing, which petitioner did, both in the written objection and again at the hearing.

The Fifth Circuit addressed the issue at greater length in its discussion of exceptions in bankruptcy to decisions which are subject to res judicata. Once the malpractice counterclaim is

raised at the fee application hearing, the court would have to order that rule 7013 of the Federal Rules of Bankruptcy Procedure be applied to the fee application matter in order to subject the claim to res judicata. A bankruptcy judge is allowed at any time to convert a procedure into an adversarial proceeding.

A debtor's damages from an attorney's negligence are far greater than the smaller sums of money sought in an attorney's fee application. By ordering that rule 7013 be applied to the fee application matter the court can consider damages.

If the court does not cite rule 7013 and order that the rules in 9014 be applied, formally to address the counterclaim, the debtor is free to file the legal malpractice adversarial proceeding. The Fifth Circuit ruling, *Iannochino v. Rodolakis* is clearer on the issue of when the counterclaim is raised without a specific monetary figure in damages identified. The court must still subject the counterclaim to res judicata by ordering that rule 7013 be applied to the fee application matter. The other authorities the respondent has cited are not relevant to this petition.

II.

MERIT OF THIS PETITION

This case is important because at present the only way a person in bankruptcy can file a legal malpractice claim is if they manage to raise the issue at a fee application hearing and have it properly litigated. In case after case it has been found that the debtors are barred from filing a later claim if they did not raise

the issue at the hearing.

There is no notification to debtors of this procedure. There is a mandatory arbitration for all of the debtor's other creditors, except for the attorneys. When a debtor enters bankruptcy the only person the debtor is allowed to have contact with until a re-organization plan is confirmed is the attorney. The attorney is not likely to inform the debtor that the ONLY way to bring a malpractice action is to raise the issue at a fee application hearing.

These present rulings on this issue leave the bankruptcy attorney basically IMMUNE from the possibility of a malpractice suit. The attorney can be as casual as he wants in representing his clients. According to the publication Mallon and Mallon on Legal Malpractice, one third of malpractice suits involve bankruptcy attorneys. Perhaps this virtual immunity from prosecution is part of the reason.

In addition to this, the attorney can get his fees immediately in spite of the quality of his services. Unlike attorneys practicing in other courts who sometimes have to wait for years for their pay, or perhaps never get it, a bankruptcy attorney can have a debtor liquidated by the judge to pay his fees. Respondent threatened the petitioner that he would convert the case to a Chapter 7 to get the $10,000 owed to him. This is why the respondent raised the malpractice issue at the attorney's fee hearing. Respondent never would have done this but was angry because in addition to all the other damage the attorney had done he now wanted to liquidate the petitioner.

At the attorney's fee application hearing, the petitioner wanted to have the matter heard at the California Bar

Association where ethical standards are very high. The court informed petitioner that he was the only possible arbitrator. Petitioner's wariness of the court's objectivity was confirmed when he found completely in the attorney's favor based largely on a suspicious letter. Mandatory arbitration for debtors with their attorneys would offer a solution to this problem and insure objectivity, or to have the District Court arbitrate attorney's fees.

Ideally this court could take this opportunity to decide that debtors are not barred from pursuing malpractice claims if they were not raised at the fee application hearings. Persons in bankruptcy are often smart people who have accumulated some assets, but run into problems and need protection from the bankruptcy court. There is a sense of shame debtors face in addition to the fear of closing their assets. This can make them, unfortunately, perfect targets. Giving debtors the freedom to file legal malpractice counterclaims at any time would be in keeping with the spirit of the bankruptcy system to protect debtors and creditors.